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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN SARDY,

Petitioner

VS.

LATRELLE C. HODGE, Executrix

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

LOUIS LEVENSON
COUNSEL FOR THE PETITIONER
125 BROAD STREET, S.W.
ATLANTA, GA. 30303
(404) 659-5000
GA. BAR # 447938

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Georgia statute (OCGA § 53-4-4) that alters, by 1991 amendment, the evidentiary method of establishing and proving paternity for an illegitimate child, after the death of alleged father, is procedural in nature (and should be given retroactive effect) or is substantive in nature (and should not be given retroactive effect)?

2. Whether an exclusively prospective application of the Georgia statute (OCGA § 53-4-4, as amended in 1991), based upon the facts of this case, is a violation of the due process and equal protection rights of John Sardy, Petitioner, an illegitimate child seeking an adjudication and determination of his paternity? Sardy seeks

to use DNA testing on the alleged father (now deceased) or on blood relations to the alleged father and on others to prove and determine such paternity, even under circumstances where the statute allowing such DNA testing was adopted and passed into law after the death of the alleged biological father.

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REFERENCE TO REPORTS

To the best of the knowledge, information and belief of the Petitioner herein, the opinions and decisions of the Courts below have not been reported in any reporters, officially or unofficially.

CONCISE STATEMENT OF GROUNDS FOR INVOKING JURISDICTION OF THE SUPREME COURT BY AND THROUGH THE CONSTITUTION AND STATUTORY PROVISIONS INVOLVED:

(i) The jurisdiction sought to be reviewed is that of the Georgia Supreme Court in affirming the order and judgment of the Superior Court of Cobb County, Georgia, dated September 21, 1994. Petitioner filed a Motion for Reconsideration to the Georgia Supreme Court dated September 30, 1994. The Georgia Supreme Court denied petitioner's Motion for Reconsideration on October 17, 1994.

(ii) No extension of time for filing of this petition for Writ of Certiorari has been filed in this case, to the best of Petitioner's or counsel's knowledge, information and belief.

(iv) A) The statutory and/or Constitutional provision which, in the opinion of the Petitioner, is believed to confer jurisdiction for review of this matter in the Supreme Court of the United states is Article III of the Constitution of the United States of America.

B) The Statutory authority is as follows:

28 USC 1257 State Courts: Certiorari

(a) Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any

title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONS AND STATUTORY PROVISIONS

U.S. Const. amend V.

U.S. Const. amend. XIV, Section 1.

28 USC 1257. State Courts: Certiorari.

42 USC 654, 655: 1974 Social Service Amendment to Social Securities Act.

OCGA 19-7-46: Evidence at trial.

OCGA 53-4-4: Inheritance by children born out of wedlock and their offspring.

FACTUAL STATEMENT OF THE CASE

Petitioner, John Sardy, was born out of wedlock on December 31, 1954. John Wesley Hodge, Jr. died on December 4, 1983. Petitioner herein, claiming to be the illegitimate child of the deceased John Wesley Hodge, Jr., filed a "Petition to Determine Heirs" in the Cobb County Probate Court, State of Georgia, in October 1992. The petition was filed in connection with the Estate of John W. Hodge, Jr., deceased, said estate then (and now) still open and pending in the Cobb County Probate Court. Petitioner Sardy sought to be recognized as an heir of the deceased in order to claim as a "child" under the deceased's will and trust. This entitlement is based on Sardy's claim that he is the illegitimate issue of

the deceased John Wesly Hodge, Jr.

The Respondent Latrelle C. Hodge is the lawful spouse, and now widow, of the deceased John Wesley Hodge, Jr.

In the courts below, Appellee accepted the fact, according to the evidence adduced from family, that Petitioner Sardy was and is the son of John Wesley Hodge, Jr.. This evidence came from admissions of the deceased John Wesley Hodge Jr. to family members and the uncanny resemblance between father and son.

PROCEDURAL HISTORY OF THE CASE

The Petitioner in this action is John Sardy, domiciled at present in the State of New York.

The Respondent is Latrelle C. Hodge, Executrix of the Estate of John Wesley Hodge, Jr., the latter Executrix domiciled

in the State of Georgia.

In October 1992, Sardy petitioned the Probate Court of Cobb County, Georgia for the determination of the heirs at law of John Wesley Hodge, Jr., Sardy claiming to be a member of the class of children of the decedent and thus a beneficiary of the trust and the estate.

The estate of John Wesley Hodge, Jr., through Respondent as Executrix, notwithstanding the deceased's admission to family of the fact of paternity and the resemblance, opposed Sardy's claims on procedural grounds and was awarded summary judgment after establishing, without dispute in the record, that the decedent John Wesley Hodge, Jr. had not, during his lifetime, petitioned to legitimate Sardy nor had Sardy been declared the child of decedent Hodge by

any court of competent jurisdiction.

A "de novo" appeal was taken by Sardy to Cobb Superior Court, which likewise granted summary judgment in favor of the estate and Appellee Latrelle Hodge.

Appeal was filed in the Georgia Supreme Court which affirmed the judgment of the Superior Court of Cobb County, Georgia. The Supreme Court of Georgia held, inter alia, that the will is construed according to the law in effect at the time of testator's death and that any statutory change in the law after the testator's death relating to the proof of inheritance rights of children born out of wedlock does not apply or work to the benefit of Sardy.

The Georgia Supreme Court further held that, absent an adjudication of paternity during the testator's lifetime or an

intention by the testator to include Sardy within the class of "children" in his will, Sardy had no inheritance rights under law.

The Georgia Supreme Court did not address the issue of whether the 1991 changes in the Georgia statute (regarding illegitimates inheriting from their fathers) allowing for genetic testing were substantive or procedural, other than to say the 1991 amendment to OCGA 53-4-4 would not be given retrospective effect and that the "law" in effect at the time of death would control.

Petitioner Sardy has consistently argued in the Cobb Superior Court and the Georgia Supreme Court that the rights of an illegitimate to prove his paternity are fundamental, constitutional rights and that OCGA 53-4-4 sets up procedural and remedial

standards to assist such proof of paternity; therefore, upon the statutory law being changed at various times, and most importantly in 1991, the effect of such law changes adding DNA testing as a means of proving paternity was retroactive in scope and should be applied to Petitioner Sardy. Further it was urged by Sardy in the Courts below that to deny Sardy the opportunity to prove paternity, based upon the facts of this case and the absence of any compelling state interest in opposing a retroactive application of the 1991 amendment to OCGA 53-4-4, would be a violation of Sardy's Due Process and Equal Protection rights guaranteed by the 5th and 14th amendments to the United States Constitution.

SUMMARY OF LEGAL ARGUMENT

A. SUBSTANCE V. PROCEDURE

This Court ruled in Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459 (1977) that it was unconstitutional to disallow an illegitimate child's right to inherit from his father's estate. The ruling intended to address substantive law and have only prospective application in that illegitimate children could only inherit from those fathers who died after April 26, 1977. Petitioner's alleged father, John Wesley Hodge, Jr. died on December 4, 1983, and upon that date, the Petitioner, as an illegitimate, had a vested right to inherit from his father if he could prove paternity.

In 1980 Georgia codified the import of this Court's ruling in Trimble and set forth the procedures under which an illegitimate

child could prove or establish his or her birth right to inherit from its father:

> An illegitimate child may not inherit from or through his father or a paternal kin by reason of the paternal kinship unless during the lifetime of the father and after the conception of the child a court of competent jurisdiction has entered an order declaring the child to be legitimate under the authority of Code Section 74-103 or such other authority as may be hereafter provided by law or a court order establishing the father of the illegitimate child. If such an order has been entered, an illegitimate child may inherit in the same manner as if legitimate from and through his father, from and through the other children of his father, and from and through any other paternal kin, whether collateral or lineal. (This law, Georgia Code Annotated § 113-904(c), later became OCGA § 53-4-4.)

Clearly, in Georgia, between 1980 and 1991, illegitimates could inherit from and through their fathers if an order was passed by a Court during the father's lifetime on said issue.

In 1991, the law, now codified at OCGA 53-4-4, was amended again. Specifically, the law added DNA blood tests to the means by which paternity could be proved. Nothing, however, was done in 1991 to alter the dramatic substantive law change effected in 1980, following Trimble and parallel cases in Georgia, (allowing illegitimates to inherit from and through their fathers where there had been no such right or entitlement previously) except to provide additional methods to prove same, including scientific methods not in existence at the time of the 1980 substantive law change.

In the 1991 amendment, two sub-paragraphs (now paragraphs (c)(2)(a) and (c)(2)(b)) were added to OCGA § 53-4-4, setting forth additional circumstances under which methods an illegitimate heir could

prove when he or she might inherit from or through the father. No such procedures existed prior to 1991. The law now reads as follows:

OCGA 53-4-4 (c) (2) (A)

Paragraph (1) of this subsection notwithstanding, a child born out of wedlock may inherit from or through his father or any paternal kin by reason of the paternal kinship if evidence of the presumption of paternity described in this code section is filed with the court before which proceedings on the estate shall be pending and the presumption is not overcome to the satisfaction of the trier of fact by clear and convincing evidence.

OCGA 53-4-4 (c) (2) (B)

There shall exist a rebuttable presumption of paternity of a child born out of wedlock if there shall have been performed after conception of the child, parentage determination genetic testing which establishes at least 97 percent probability of paternity. Parentage determination genetic testing shall include, but not be necessarily limited to, red cell antigen, human leucocyte (HLA), red cell enzyme, and serum protein (electrophoresis) tests or testing by deoxyribonucleic (DNA) probes.

The latter two provisions set forth

evidentiary methods for determining paternity provided such procedure was completed "after conception of the child." The requirement (from 1980-1991) that such be done during the life of the father was no longer controlling; that language was deleted from the statute in 1991. No other limitations were set out in the statutory sub-paragraphs.

The 1991 law change now allows an illegitimate child to establish paternity, as described in OCGA 53-4-4(c)(2), after the death of the father because the statute expressly references a claim in a "court before which proceedings of the estate shall be pending...". Such reference in the statute to "estate" could only mean the deceased's estate. The date of death now only serves to determine the class of

persons who may take as heirs. After 1991, the illegitimate's claim to paternity must be proven by clear and convincing evidence, even after the death of the alleged parent.

In Pritchard v. Savannah Street and Rural Resort Railroad Co., 87 Ga. 294, 13 S.E. 493 (1891), the Supreme Court of Georgia held that:

"the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts, even where the alteration which the statutes make has been disadvantageous to one of the parties. A law which merely alters the procedures may, with perfect propriety, be applicable to past as well as future transactions."

This Court held in Bradley v. School Board of City of Richmond, 416 U.S. 696, 94 S.Ct. 2006 (1974) that an:

> "appellate court must apply the law in affect at the time it renders its decision unless such application would work a manifest injustice to the contrary; even

> where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect".

This Court, in determining whether it would work an injustice to apply a change in law to a pending case, held that a court should consider (a) the nature and identity of the parties, (b) the nature of their rights and (c) the nature of the impact of the change in law on those rights.

The Georgia Supreme Court in Sardy v. Hodge, Case No. S94A0756, by not giving recognition and effect to the procedural changes in the law in 1991, has, without just legal cause, rendered Petitioner's fundamental right to inherit irremediable. He is denied the use of DNA evidence and other blood testing in order to prove his paternity. The Georgia Supreme Court, in

ruling upon Petitioner's case and, by giving only a prospective application to the current Georgia statute, as amended in 1991, has now allowed discrimination against and unequal treatment of illegitimate children in Georgia whose fathers died between the years 1980 and 1991 inclusively, thus violating those persons' rights to Equal Protection and Due Process. In Polito v. Holland, 258 Ga. 54, 365 S.E.2d 273 (1988), the Georgia Supreme Court held the collateral source rule (relating to the right of the Defendant to admit evidence at trial of the Plaintiff's other auto insurance and claims thereunder), previously believed prior to 1988 to be a procedural matter, to be one of substantive law which did not have retroactive effect. In discussion, the Supreme Court of Georgia

went on to say that "where a statute governs only procedures of the courts, including the rules of evidence (emphasis added), it is to be given retroactive effect absent an expressed contrary intention" Polito v. Holland, 258 Ga. 54, 365 S.E.2d 73 (1988). In Polito, supra, the Georgia Court further held that "substantive law is that law which creates rights, duties, and obligations. Procedural law is that law which prescribes the methods of enforcement of rights, duties, and obligations".

The demonstrable conclusion that the 1991 change in OCGA § 53-4-4 is a rule of evidence, and is therefore entitled to retroactive effect under the construction given same in Georgia in Polito, can be seen further by comparing OCGA 53-4-4 with the obviously parallel language of OCGA 19-7-46

(EVIDENCE AT TRIAL). The latter Georgia Code section relates to blood testing for paternity determinations in Domestic Relations cases.

"OCGA 19-7-46 Evidence at Trial.

(b) There shall exist a rebuttable presumption of paternity of a child born out of wedlock if there has been performed scientifically credible parentage-determination genetic testing which establishes at least a 97 percent probability of paternity. The rebuttable presumption of paternity can be overcome by the presentation of competent evidence as determined by the trier of fact. Parentage-determination testing shall include, but not necessarily be limited to, red cell antigen, human leucocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis testing or testing by deoxyribonucleic acid (DNA) probes."

The above law changes to OCGA 19-7-46, effective in 1993, are, with only a few minor additions to the language of OCGA 53-4-4(c)(2)(A) and OCGA 53-4-4(c)(2)(B), identical. Such a striking parallel shows

the clear intent of the Georgia Legislature for the 1991 changes to OCGA 53-4-4 to be treated as rules of evidence. And changes in rules of evidence are retroactive, because they expand existing rules. They do not create rules of law , Miller v. Kirshner, 621 A.2d 1326 (Conn. 1993).

The 1991 change to OCGA 53-4-4 was NOT a substantive change in the law because it did not change the status or class of any persons who could potentially inherit as illegitimates, as was done in 1980. The change was procedural, first, because the vocabulary of the code ("rebuttable presumption"), utilized terms of evidence. More importantly, it created new procedures that did not exist in 1983 for the introduction of evidence to enforce rights, duties, and obligations to prove paternity,

(in identical fashion to the evidentiary provisions of OCGA § 19-7-46).

Statutes of limitation, previously believed to be substantive rules of law, have recently been given retroactive application in Connecticut due to the advent of the newest DNA and HLA blood testing. In Moore v. MacNimara, 201 Conn. 16, 513 A.2d 660 (Conn. 1986), the Supreme Court of Connecticut states that "because paternity statutes derogated from the Common Law and thus created the right of action, statutes of limitation within them were considered substantive and jurisdictional". As referenced and cited in Moore, Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872 (1973) added to the Common Law holding that "once a state posits a judicially enforceable right on behalf of children to needed

support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother". The Supreme Court of Connecticut in Moore v. MacNimara adopts a retroactive application of the new statute of limitations (to the advantage of the child) and determines that such will not work an injustice on the Defendant (the putative father).

The Supreme Court of Connecticut, after Moore, heard Miller v. Kirshner, 225 Conn. 185, 621 A.2d 1326 (Conn, 1993), and again made a retrospective application of new law relating to DNA testing. There the defendant argued that the retroactive application of the statute permitting HLA tests was unwarranted because the statutory amendment

affected the defendant's substantive rights. The Supreme Court of Connecticut found that this reliance on the amended section 46b-168, as the sole basis for admission of HLA test results, was misplaced. The construction by the Connecticut Supreme Court in Miller v. Kirshner is parallel, if not on "all fours" with the argument made by the Petitioner Sardy herein. The Supreme Court of Connecticut states:

> "Public Act 89-360 section 44 did not create the right of a mother to receive support for a child born out of wedlock; it merely expanded the period of time for which such support could be received. The amendment to section 46b-160, therefore, was not directed to the right itself, but to the remedy. This type of amendment is generally a distinctly procedural matter".

See Roberts v. Caton, 224 Conn. 483, 619 A.2d 844 (1993). Sardy's inclusion in the

class of persons (substantively) to take as an heir or "child" of the deceased was complete after Georgia's substantive 1980 law change (allowing illegitimates to inherit from their fathers). That substantive law change in 1980 preceded the death of John Wesley Hodge, Jr. in 1983. However, it wasn't until the 1991 amendment to the Georgia Statute, now codified at OCGA 53-4-4, that the law provided a remedy or an "expansion" of the means of enforcing a substantive right.

It seems unnecessary to enumerate the various public policies in favor of legitimacy, marriage, etc. for all manner of governmental operations. Such a public policy favoring legitimacy would be meaningless if the law did not enhance a fair and equal treatment of all

illegitimates by providing them with the most up-to-date and reliable scientific procedures (which are sufficiently reliable to be admitted in evidence in a court of law) to aid them in asserting and proving their paternity whether for continuation of child support obligations or for the inheritance purposes as set forth in OCGA 53-4-4.

B. DUE PROCESS

In any due process analysis, the interests of the individual are weighed against the state's interest in controlling or managing the legal procedures. With the advent of DNA testing (and the universal acceptance of same as an accurate means of proof) the state's interest in avoiding fraudulent claims is substantially minimized.

In a case where an illegitimate child of the deceased person sought to require a legitimate child to submit to a blood test (presumably against the will of the legitimate child), the Supreme Court of Louisiana held in Sudwischer v. Estate of Paul Hoffpauir, 589 S.2d 474 (1991) that the illegitimate child "has a constitutional right to prove filiation to a deceased father."

In North Dakota, a genetic testing statute was determined to have retroactive application as against a putative father where the claim against the putative father arose 16 years before the amendment to the statute adding DNA testing to the Uniform Parentage Act of North Dakota; Stark County Social Service Board v. R.R., Respondent and Appellee, 477 N.W.2d 819 (N. Dakota 1991).

In that case, the trial court was reversed by the Supreme Court of North Dakota for refusing to charge the jury on the presumption of paternity where the genetic tests of both the mother and the father of the child showed the statistical probability of parentage being 95% or higher. This ruling on the child's claim for paternity brought by the Social Service Agency as against the putative father was 16 years after the child's birth and long after the statute of limitations would have run on such child's claim; nonetheless the law was given retroactive effect with the explanation that the cause was filed after the 1989 North Dakota amendment.

Other states, citing public policy concerns, have similarly reversed previous rulings of those Courts. Such states are

now expressing central concerns for the welfare and support rights of children, owing to the certainty of the medical advancements in scientific paternity tests. In Johnson v. Adams, 18 Ohio St. 3rd 48, 479 N.E.2d 866 (Ohio 1985), the Supreme Court of Ohio "now favors application of a rebuttable presumption of paternity whereby the biological father of a child will not be able to escape all responsibility for the child's support". Though this action in Ohio involves a determination of paternity in the father's lifetime and not after death (as in Petitioner Sardy's claims), Ohio enunciates its own strong public policy and implies due process rights in favor of the child which supervene over the State's interest in the orderly administration of estates or over the rights of the

father.

Louisiana, in reviewing its own Constitution, specifically, Art. 1, Section 3, "Right to Individual Dignity", acknowledged, "no law shall arbitrarily, capriciously or unreasonably discriminate against any person because of birth, age, sex..." In the matter of Joseph L. Robins, 349 So.2d 276 (La. 1977).

This Court has adopted rules of law that prevent unreasonable discrimination against persons because of accidents of birth. In Texas, a statute purported to uphold a 1 year limitation period within which an illegitimate child must obtain a support order or the suit would be barred. That Texas statute was determined by this Court to be a denial of equal protection to illegitimate children. Mills v. Habluetzel

456 U.S. 91, 102 S.Ct. 1549 (1982). Previously the Supreme Court of the United States in Gomez v. Perez 409 U.S. 535, 93 S.Ct. 872 (1973) had reviewed Texas Law and held that "a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Gomez 409 U.S. at 538, 93 S.Ct. at 875. This Court foreshadowed Petitioner Sardy's arguments herein when this Court recognized that "the lurking problems with respect to proof of paternity are not to be lightly brushed aside" ....This Court went on to say that such did not justify "an impenetrable barrier that works to shield otherwise invidious discrimination" Mills v. Habluetzel, 456 U.S. at 1551. In Gomez v. Perez, this Court held Texas' specific

denial of support rights to illegitimate children to also be a denial of equal protection of law.

The issue of the extent to which a State can limit or control the right to establish paternity was examined in Mills v. Habluetzel, supra. Mills by comparing and reviewing Gomez, states that "the period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family and financial circumstances that often surround the birth of a child outside of wedlock". The Mills analysis advances the principle that "any time limitation placed on that opportunity (to obtain support) must be substantially related to the State's interest in avoiding

the litigation of stale or fraudulent claims". Mills, 102 S.Ct. at 1555.

Petitioner Sardy urges that immediately after the Georgia legislature enacted a remedy by which he could pursue his claim (for the first time in Georgia's history), to wit, the DNA/HLA genetic testing rules (with a 97% or better accuracy rate) now codified at OCGA 53-4-4, a suit to determine heirship was filed in 1992 in Georgia in an appropriate court of competent jurisdiction. It cannot be stated, as a matter of law, that waiting until the illegitimate is almost 38 years old to file the claim is an absolute bar to such claims when the remedy for the enforcement of such claims did not exist until the claimant was age 37.

In Little v. Streater, 452 U.S. 1, 101 S.Ct 2202 (1981), this Court recognized the

unique quality of blood grouping tests as source of exculpatory evidence. The private interests implicated in a paternity suit are substantial. Little stands for the proposition that an indigent father (involved in a paternity claim against him) has a constitutional right to have the State pay for blood grouping tests, because of the unique and reliable quality of those tests. Petitioner Sardy is no different than Walter Little. Sardy's opportunity 1) to be heard has been foreclosed from him and 2) he has been denied an opportunity to definitively either establish or exclude his putative father by highly reliable blood test evidence; such exclusion violates his 14th Amendment rights without any arguable prejudice to appellee's or State's interest should he be allowed to use such DNA tests.

The Fourteenth Amendment provides in part: "No state shall... deprive any person of life, liberty or property without due process of law." Petitioner argues that 1) his liberty interest in knowing his heritage and 2) his property interests (set out and prove claim under his father's estate) have been abridged by the Georgia Supreme Court's construction of O.C.G.A. § 53-4-4 adverse to Sardy thereby denying his request for DNA testing to prove his claim. The State interests are admittedly substantial in managing the orderly administration and swift closure of estates. The State is also interested that the procedures used to determine heirship, particularly when such claims are filed by an illegitimate, will not lead to erroneous and unjust results; the State also has an interest in definitely

excluding a high percentage of falsely accused putative fathers whether relating to support or intestacy cases.

"Due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Joint Anti Fascist Refugee Committee v. McGraff, 341 U.S. 123, 71 S.Ct. 624 (1951). Little v. Streater, 101 S.Ct at 2205. Rather it is "flexible and calls for such procedural protection as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972).

Petitioner has continued to argue consistently, throughout the Cobb County Probate Court, Cobb Superior Court and Supreme Court of Georgia , that it is a violation of his Constitutional Rights to Due Process and Equal Protection to deny

Petitioner retroactive application of OCGA 53-4-4.[1]

C. EQUAL PROTECTION

In Clark v. Jeter, 486 U.S. 456, 108 S.Ct. 1910 (1988) the Pennsylvania six year statute of limitations for the bringing of paternity actions was determined to be violative of the equal protection clause of the United States Constitution under the "heightened scrutiny" analysis. Again this Honorable Court determined that any period

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[1] Plaintiff's Brief in Response to Defendant's Motion for Summary Judgement, 4/22/93, Cobb County Probate Court, State of Georgia; Plaintiff's Supplemental Brief in Support of Response to Defendant's Motion for Summary Judgment, 4/22/93 Cobb County Probate Court of Georgia; Response to Defendant's Motion for Summary Judgment, 08/10/93, Cobb County Superior Court, State of Georgia; Appellant's Brief to the Georgia Supreme Court, 03/09/94; Supplemental Brief of Appellant to the Georgia Supreme Court, 08/23/94.

of limitation must present a reasonable opportunity for those with an interest in the illegitimate children to assert those claims on behalf of the illegitimate children and that any limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims, citing Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549 (1982). This Court, in striking down the six year limitation period for making paternity claims, acknowledges that there are "sophisticated scientific tests facilitating the establishing of paternity regardless of the child's age". This careful selection of language by this Court presumably references the genetic testing at issue in this matter which, in Connecticut under Moore v

McNimara, 201 Conn. 16, 513 A.2d 660 (Conn. 1986) and Miller v. Kirshner, 255 Conn. 185, 621 A.2d 1326 (Conn. 1993) provide for the exclusion of over 99% of those who might be accused of paternity regardless of the age of the child. Pennsylvania's failure in Clark v. Jeter to show a compelling interest in the limitation period or at least an interest superior to that of the child in determining his paternity resulted in that provision being struck down.

For Petitioner Sardy, the admissible scientific evidence, codified into Georgia law in 1991, was not available to him during his minority and, as such, any time period of limitation for the enforcement of such claims, would and could only begin to apply after such time as the remedy was made available to him. The Georgia Supreme Court

has limited Sardy in his efforts to enforce his rights because he did not adjudicate same during his father's lifetime. Sardy is being treated differently than others similarly situated without legal cause. For the appellee (or for the State of Georgia) to argue for the exclusively prospective application of the statute discriminatorily burdens the individual illegitimate in his quest for a finding of his paternity, and therefore such application of State law must fail under the "heightened scrutiny" test.

For the Georgia Supreme Court to hold that the 1991 statutory change does not apply to Sardy because it was not the law in effect as of the date of John Wesley Hodge, Jr.'s death, is a "substantive" law or prospective only analysis and denies Petitioner the opportunity to prove his

"filiation" claim as against the Respondent estate. This requires of Petitioner, a bastard, a burden of proof, (as to establishing his parentage), not applied to any other persons. Courts of other States, relying on general authority from this Court, have held that a child seeking filiation should not be denied rights merely because he was born out of wedlock. This Court, in a case involving illegitimate childrens' rights to recover for the wrongful death of their mother, held in Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1968) that "[t]hey (illegitimate children) are persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment." This Court further held that "[w]hile a state has broad power when it comes to making classifications..., it may

not draw a line which constitutes an invidious discrimination against a particular class." This Court concluded that "... it is invidious to discriminate against them (illegitimate children) when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done to the mother".

In a case involving a worker's compensation claim by an illegitimate child, this Court held in Weber v. Aetna Casualty & Surety Company, 406 U.S. 164, 92 S.Ct. 1400 (1972) that:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens

> should bear some relationship to individual responsibility or wrongdoing."

Weber, 406 U.S. at 1407 further held that "... the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth...".

In the case at bar, Respondent/Appellee might argue that the claim to paternity by the illegitimate child, Sardy, should have been made prior to the death of the John Wesley Hodge, Jr. in 1983. There presently is no dispute that such claims to paternity were not made by Sardy during the lifetime of his biological father. However, as further argued in Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549 (1982), "in support suits by illegitimate children, more than in support suits by legitimate children, the State has an interest in preventing the

prosecution of stale or fraudulent claims and may impose greater restrictions on the former than it imposes on the latter", and that "such restrictions will survive the Equal Protection scrutiny to the extent they are substantially related to a legitimate state interest". Mills supra, 102 S.Ct. at 1598, 1599. See Lalli v. Lalli, 439 U.S. 259, 265, 99 S.Ct. 518, 523 (1978), and Trimble v. Gordon, 430 U.S. at 767, 97 S.Ct at 1463. "The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to prevent a real threat of loss or diminution of evidence or an increase of vulnerability to fraudulent claims". Mills v. Habluetzel, 456 U.S. at 97, 120 S.Ct. 1554.

In its report on the 1974 Social

Services Amendment to the Social Security Act, 42 U.S.C. 654 and 655, the Senate Finance Committee stated:

> "in taking the position the child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the [C]ommittee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child... The Committee is convinced that paternity can be ascertained with reasonable assurance, particularly through the use of scientifically conducted blood typing". S.Rep.No. 93-1356, p. 52 (1974), U.S. Code Cong. § Admin. News 1974, pp. 8133. 8155. Footnote 9. Little v. Steater,452 U.S. at 14, 101 S.Ct. at 2209.

In a case arising where an illegitimate could inherit by intestate succession only from the mother, this Court held in Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459 (1977) that "... we have expressly

considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born out of their illegitimate relationships." Georgia followed with similar reasoning in Poulos v. McMahan, 250 Ga. 354, 297 S.E.2d 451 (1982).

In a case where a child born out of wedlock sought to inherit from his putative father by proving paternity through genetic testing, the Court of Common Pleas of Franklin County, Ohio, looking to this Court for guidance, held in Alexander v. Alexander, 42 Ohio Misc. 2d 30, 537 N.E.2d 1310 (1988) that "[a]fter taking judicial notice of the accuracy of the DNA test, the court recognizes that the problems of proof inherent to an action in which paternity is alleged should no longer deprive an

illegitimate child proving paternity." Again, relying on the United States Supreme Court's philosophy in Trimble v. Gordon, the Ohio Court further held:

> "As evidenced by the United States Supreme Court decisions as well as the Ohio Supreme Court decision in White v. Randolph, 59 Ohio St.2d 6, 391 N.E.2d 333 (1975) the bottom line to denying an illegitimate child equal inheritance rights is that there is a substantial problem of proof of paternity, especially after the alleged father is dead. Today, however, we are entering into a new area. Science has developed a means to irrefutably prove the identity of an illegitimate child's father. No longer are we dependent upon fallible testimony, nor are we concerned that the decedent cannot be present to defend himself. The accuracy and infallibility of the DNA test are nothing short of remarkable. We live in a modern and scientific society and the law must keep pace with the development." ... "The problems of proof which have been the basis of denying inheritance rights to

> illegitimate children have been removed by the advent of this new genetic testing." Alexander v. Alexander, 537 N.E.2d at 1314.

Though states do have plenary control over the administration of estates, and can distinguish between classes of persons who may inherit under that state's law, if any distinction is drawn, "though the test has been variously stated, the end result is where the line drawn is a rational one" Morey v. Doud, 354 U.S. 457, 465, 466, 77 S.Ct. 1344 (1957).

In that connection, Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518 (1978) says that the State also has an interest in the orderly disposition of estates which may "bar assertion of paternity claims after distribution of an estate". In the case at bar, unlike the facts in Lalli, the

"estate is under administration and claim is timely." Reed v. Campbell, 476 U.S. 852, 106 S.Ct 2234 (1986). The estate and trust of John Wesley Hodge, Jr., deceased, is still being administered. It has not been distributed or finalized. Lalli recognizes, in disputes as to paternal inheritance by illegitimate children, the unique and difficult problems of proof. Lalli, 439 U.S. at 260, 99 S.Ct. at 519.

Justice William Brennan, while a member of the Appellate Division of the New Jersey Superior Court, wrote "in the field of contested paternity, the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity". Little v. Streater, 452 U.S. at 6, 101 S.Ct. at 2206.

Petitioner contends that the Georgia Legislature did not intend for a distinction to be made (after 1991) between those seeking legitimation before or after the death of their fathers. Such distinction makes very little rational sense in an era where accurate DNA and other blood testing is the norm. It is the equivalent of the Georgia legislation, now obsolete, that sought to distinguish and protect those fathers (against whom support was claimed) who acknowledged paternity during their lifetimes from those who did not. When confronted with DNA blood testing and modern science, which no longer even requires the father to be in life to prove such paternity, a "heightened scrutiny" analysis allows the decision below to be reversed.

REASONS FOR GRANTING CERTIORARI

By granting certiorari, this Court can seek to establish uniformity among the states on the recognized fundamental, constitutionally protected rights of illegitimates to determine their paternity. Particular care and scrutiny is needed, as in Georgia, when a state seeks to impinge upon an illegitimate's right to remedy his fatherless condition by utilizing a new procedure not available at the time of his birth. Georgia's Supreme Court, interpreting OCGA 53-4-4, as amended in 1991, by adopting, in effect, a prospective only application of the evidentiary rules relative to DNA testing, violates due process and equal protection rights of Sardy. Georgia's Supreme Court gives no guidance in its ruling as to why

this analysis should apply or how it comports with the balancing between the state's interest and the illegitimate's right of self determination.

However, notwithstanding what Petitioner Sardy feels is the unresponsive opinion of Georgia's highest Court, the Supreme Court of Georgia obviously feels the issue is timely. Georgia awaits this Court's view, having ordered the stay of remittitur of its decision (Appendix A-58,59).

Georgia law, or any other state's law, must demonstrate a compelling interest in legislating in favor of a prospective only application of the 1991 amendment to OCGA 53-4-4, which interest must be stronger than that of the illegitimate seeking his paternity. Upon

the facts of this individual case, only a retroactive application of the subject Georgia statute, particularly in view of the advances in DNA and other scientific testing of blood for paternity purposes, accommodates the broad scope of due process and equal protection. This application will not compromise a State's interest in the orderly administration and reasonably swift closure of probate estates. Heightened scrutiny on this issue in Georgia must cause the present interpretation of the law to fail when it unjustifiably eliminates or minimizes the ways in which an illegitimate may remedy his fatherless condition for any purpose.

CONCLUSION

Modern medicine would not withhold

providing a newly discovered drug to a gravely ill person to remedy his ailment based on whether that person contracted his disease before or after the discovery of the new medicine. Likewise, the goal of the judicial system is to remedy ills and injustices created amongst people in their business and social intercourse.

The judicial system can and should integrate into its fold the benefits of modern science and apply such benefits to all interested litigants, regardless of when those litigants arrive on the scene, subject only to either a) the demonstrated, compelling state interest in organizing the legislative application of that remedy otherwise and/or b) the substantial injustice that might result to the litigants or the judicial system

generally by the application of that remedy to persons whose problems predated the discovery of such a remedy. That is precisely the situation and problem that is presented for Petitioner Sardy; no just cause exists to preclude him from participating in the newly created statutory remedy. The Supreme Court of Georgia has simply said that the law in effect at the time of death controls the application of the statute. Other states, as shown above, have acted differently on similar facts with similar developments of law.

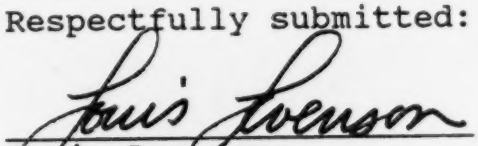
Additionally, as argued in the brief above, the law in question (OCGA 53-4-4) should afford the highest standard of care to the illegitimate child, of whatever age, to allow enforcing his or her legal

rights so as not to afflict that illegitimate child with further social disability beyond that which was cast upon such illegitimate by the infamy of his parents. Absent compelling legal justifications, the judicial system and the statutory framework operating within it, should afford due process and equal protection to those persons whose rights to determine paternity and/or seek support during minority, because such rights are essential to the achievement of public policy goals, of the orderly disposition of estates and of promoting family values and consistency.

The Petitioner simply urges that his Petition for Certiorari be granted so that this matter may be briefed more fully to this Court on issues that Petitioner

believes are of moment and significance to the Petitioner and to society as a whole.

Respectfully submitted:



Louis Levenson
Ga. Bar # 447938

125 Broad Street, SW
Atlanta, GA 30303
(404) 659-5000

S94A0756

SUPREME COURT OF GEORGIA

Atlanta Oct. 31, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

BY: Thompson, J.

The following direction was given:

JOHN SARDY V. LATRELLE C. HODGE, EXTRX.

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this Court's judgment rendered in this case on October 17, 1994, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-

fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application of certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

s/ Hugh P. Thompson
Justice Hugh P. Thompson

Appendix B-61

SUPREME COURT OF GEORGIA

ATLANTA OCTOBER 17, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

Case No. S94A0756

JOHN SARDY V. LATRELLE C. HODGE, EXTRX.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk

Appendix C-62

Supreme Court of Georgia Sep. 21, 1994

Decided:

S94A0756. SARDY V. HODGE

THOMPSON, Justice.

John Wesley Hodge, Jr. died testate on December 4, 1983. Appellate John Sardy claims to be his natural son, born out of wedlock. Appellee Latrelle Hodge is decedent's widow and executrix of his estate. Decedent duly executed a last will and testament in January 1981, which was probated in solemn form upon his death. Under the terms of the will, a trust we established for the benefit of the decedent's wife and "children." Two children were born as issue of the marriage between John and Latrelle Hodge.

In October 1992, Sardy petitioned the Probate Court of Cobb County for a

determination of the heirs at law, claiming to be a member of the class of children of the decedent and thus a beneficiary of the trust and estate. He also sough exhumation of the body for DNA testing.

The estate was awarded summary judgment after establishing that the decedent had not during his lifetime petitioned to legitimate Sardy nor had Sardy been declared the child of Hodge by a court of competent jurisdiction. A de novo appeal was taken to Cobb Superior Court, which likewise granted summary judgment in favor of the estate.[1]

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1 The petition to probate the will was filed prior to the effective date of OCGA 15-9-123; accordingly, a de novo appeal to superior court was authorized. Walker v. Yarus, 258 Ga. 346 (369 SE2d 32) (1988);

We affirm.

The law in effect at the time of the testator's death provided that an illegitimate child could inherit from the father by reason of paternal kinship only if during the lifetime of the father, the child was declared legitimate by a court of competent jurisdiction or paternity of the putative father was established by court order.[2]

Porter v. Frazier, 257 Ga. 614 (361 SE2d

2 Former Ga. Code 113-904 (c) (predecessor to OCGA 53-4-4(c), Ga.L. 1980, p. 1432, section 1) provided: "An illegitimate child may not inherit from or through his father...unless during the lifetime of the father and after the conception of the child a court of competent jurisdiction has entered an order declaring the child to be legitimate...o a court of competent jurisdiction has otherwise entered a court order establishing the father of the illegitimate child."

Appendix C-65

OCGA 53-4-4 (c) was amended in 1991 (and presently remains unchanged) to provided additional conditions under which a child born out of wedlock may inherit from or through a father. One such condition is satisfied by filing with the appropriate court results of genetic testing established at least a 97 percent probability of paternity (a rebuttable presumption of paternity), and the same is not overcome by clear and convincing evidence. OCGA 53-4-4(c)(2)(A) and (B). Sardy concedes that paternity was not established during the lifetime of the testator, but he argues the applicability of the 1991 amendment.

The will is construed according to the law in effect at the time of the testator's death. Smyth v. Anderson, 238

Ga. 343 (232 SE2d 835) (1977); Thomas v. Trust Co. Bank, 247 Ga. 693 (1) (279 SE2d 440) (1981); Gresham v. Gannon, 243 Ga. 269 (1) (253 SE2d 748) (1979). The presumption is that the testator "intended that his property should go where the law carries it..." Butts v. Trust Co. of Ga., 209 Ga. 787, 790 (75 SE2d 745) (1953). The statutory change in the law eight years after the testator's death relating to the inheritance rights of children born out of wedlock, does not benefit Sardy. The 1991 amendment will not be given retrospective effect. See OCGA 1-3-5.

Absent an adjudication of paternity during the testator's lifetime or an intention by the testator to include Sardy within the class of "children" in his will (neither of which was established), Sardy

has no inheritance rights under applicable law.

Judgment affirmed. All the Justices concur, except Hunt, C.J., and Sears-Collins, Jr., who concur in the judgment only.

AFFIDAVIT OF FILING AND SERVICE

I, Louis Levenson, do swear and declare that on this date January _____, 1995, pursuant to Supreme Court Rules 29.3, I have served the attached PETITION FOR CERTIORARI on each party to the proceedings and on every other person required to be served by depositing in the U.S. mail properly addressed to each of them with first class postage prepaid. The names and addresses of those served as follows:

Roy Eugene Barnes, Esq.
Barnes, Browing, Tanksley & Casurella
225 Lawyers Bldg.
166 Anderson Street
Marietta, GA 30060-1981

This 4th day of January, 1995.

Louis Levenson

LOUIS LEVENSON